Filed 6/5/03 P. v. Karapetian CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GRANT KARAPETIAN,

Defendant and Appellant.

2d Crim. No. B160197
(Super. Ct. No. PA 039053)
(Los Angeles County)

Grant Karapetian appeals from the judgment entered after conviction by a jury of vehicular manslaughter while intoxicated (Pen. Code, § 192, subd. (c)(3))[1] and two counts of felony child endangerment. (§ 273a, subd. (a).) The jury found true an allegation that, in the commission of vehicular manslaughter while intoxicated, appellant had caused bodily injury to two children who were passengers in his vehicle. (Veh. Code, § 23558.) Appellant was sentenced to prison for six years: four years for one count of felony child endangerment (the base term); plus one year, four months for the other count; plus eight months for vehicular manslaughter while intoxicated.

Appellant contends that the trial court erred in failing to instruct sua sponte on the lesser included offense of misdemeanor child endangerment. He also contends that his

[1] All statutory references are to the Penal Code unless otherwise stated.

six-year sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions. We affirm.

Facts

Lavera Amakaeze was driving on the freeway in the number two lane at a speed of between 60 and 65 miles per hour. She saw a silver truck "coming up fast" behind her and "going from lane to lane." Appellant was the driver of the truck. (RT 655-656) While traveling in the fast lane, appellant passed Amakaeze. After passing her, he was "weaving in and out of traffic" and was tailgating vehicles. It appeared to Amakaeze that he was trying "to get around the cars that were going slower than he was." Other witnesses estimated that appellant was traveling at more than 70 miles per hour.

A red truck was parked on the center median strip. Appellant's vehicle "drifted" from the fast lane into the median strip and struck the red truck, which burst into flames. A passenger inside the red truck died at the scene.

Two children were "strapped into car seats" in the back seat of appellant's truck. They were approximately two to three years old. The children were crying "hysterically." They had scratches and blood on their faces.

A police officer approached appellant. The officer smelled a "real strong odor of an alcoholic beverage" and noticed that appellant's eyes "were bloodshot, glassy." A blood sample taken from appellant had a blood-alcohol level of .16 percent. At this level, a criminalist testified, "a person is definitely impaired to drive a car safely."

Lesser Included Offense Of Misdemeanor Child Endangerment

Appellant was convicted of felony child endangerment, which encompasses acts committed "under circumstances or conditions likely to produce great bodily harm or death . . . ." (§ 273a, subd. (a).) Appellant contends that the trial court erred in failing to instruct sua sponte on the lesser included offense of misdemeanor child endangerment, which encompasses acts committed "under circumstances or conditions other than those likely to produce great bodily harm or death . . . ." (§ 273a, subd. (b).)

A trial court is not required to instruct sua sponte on all lesser included offenses. "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a

lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could ... conclude[]" ' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

A reasonable jury could not have concluded that appellant was guilty only of misdemeanor child endangerment. The endangerment was based on appellant's driving, and he drove "under circumstances or conditions likely to produce great bodily harm or death . . . ." (§ 273a, subd. (a).) He was weaving in and out of traffic, tailgating vehicles, and traveling in excess of 70 miles per hour. His blood-alcohol level of .16 per cent was twice the legal limit. (Veh. Code, § 23152, subd. (b).) The alcohol "definitely impaired" his ability to safely drive a vehicle. The death of the passenger in the red truck shows that his conduct was likely to produce great bodily harm or death.

Appellant argues that he was entitled to an instruction on the lesser included offense because the children "sustained minor injuries that were not severe or life threatening . . . ." "However, there is no requirement that the victim suffer great bodily harm. [Citation.]" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80.) The jury was instructed: "If a child is placed in a situation likely to produce great bodily harm or death, it is not necessary that actual bodily injury occur in order to constitute the offense."

Cruel And Unusual Punishment

Appellant contends that his six-year prison sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions. "We decide whether the penalty given 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity,' thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal Constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1042.)

Appellant's six-year prison term does not shock the conscience or offend fundamental notions of human dignity. He drove recklessly when his blood-alcohol level was twice the legal limit. He caused the death of the passenger in the red truck and endangered the lives of the children in his own vehicle. In view of the circumstances and consequences of appellant's offenses, the punishment imposed cannot be deemed grossly disproportionate.[2]

Disposition

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

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[2] Because we conclude that appellant's sentence is neither cruel nor unusual, we need not consider respondent's contention that appellant waived the issue by failing to raise it in the trial court. (See *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) (RB 16)

Melvin D. Sandvig, Judge

Superior Court County of Los Angeles

Jilbert Yahmazian, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.